Supreme Court, U.S.
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No. 03-156

In the Supreme Court of the United States

EDWARD LACHMAN,

Petitioner,

v.

BILL WIETERMARSCHEN AND
C. ERIC CROWE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO MUNICIPAL COURT OF HAMILTON COUNTY, OHIO

BRIEF OF RESPONDENTS BILL WIETERMARSCHEN AND C. ERIC CROWE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL K. ALLEN
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

DAVID T. STEVENSON
Counsel of Record
SUSAN MARIE GERTZ
ASSISTANT PROSECUTING ATTORNEYS
230 E. NINTH STREET
SUITE 4000
CINCINNATI, OH 45202
(513) 946-3120

Counsel for Respondents

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. May a person who had been improperly joined to a federal case over which a district court has no personam jurisdiction, be later presumed by a state court to have been a properly joined federal party?

2. May a federal case over which the district court had no personam jurisdiction with regard to improperly joined parties, be later presumed by a state court to have been fully litigated by them for the purpose of deciding res judicata?

3. May a barred person in a federal case for federal statutory claims, who had been barred from joining on grounds of exceeding the statute of limitations, be later barred on grounds of res judicata in a state court after timely filing a common law trespass claim arising out of the same events?

4. When deciding res judicata, may a state court impute subject matter jurisdiction to a federal court where it would not have had any such jurisdiction?

5. May a litigant in propria persona be denied equal protection of federal law when a state court fails to resolve federal issues raised in a timely manner, either by failing to certify those issues with a federal court, or failing to conduct other required procedures sua sponte on its own initiative rather than upon motion?

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JURISDICTION

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." Respondents further submit that Petitioner's claims do not relate to any of the listed items included in Rule 10 regarding the character of the reasons that this Court would grant a writ of certiorari. As such, the matter herein is not a matter of great legal importance, and there are no compelling reasons to grant the within Petition. Therefore, the writ should be denied.

STATEMENT OF THE CASE

The claims at issue in Edward Lachman's (hereinafter "Petitioner" or "Petitioner Lachman") petition for writ of certiorari herein have already surfaced in a number of courts, both federal and state. They relate, primarily, to the arrest of Petitioner's son, Max Lachman, on November 14, 1997 at Petitioner Lachman's home. Max Lachman had been sentenced to prison prior to 1997, but he was granted judicial release and placed under the supervision of the Adult Probation Department as a condition of a community control sanction (probation) following his release. Due to a probation violation, he was arrested on said date by two Hamilton County, Ohio, Court of Common Pleas adult probation officers, Bill Wietermarschen and C. Eric Crowe, the Respondents herein.

On May 14, 1999, Max Lachman, acting *pro se*, filed a Complaint and Jury Demand in Federal District Court for the Southern District of Ohio, naming as defendants Wietermarschen, Crowe, and the Hamilton County Adult

Probation Department (hereinafter "County Defendants"), and the City of Cincinnati Police Department. While that Complaint contained virtually no factual information, it appeared that Max Lachman took issue with his arrest and the subsequent proceedings regarding the probation violation. That Complaint alleged in its entirety as follows:

> False arrest starting on 14 Nov 97 at the order of the Probation Dep't. and carried out by the Police Dep't. Bodily injury while detained in Justice Center. Malicious Prosecution and Abuse of Process (misinforming witnesses; procuring non-witnesses) by the Prosecutor's Office, leading up to trial on 14 May 98. Lack of medical care throughout.
>
> For these alleged harms Plaintiff prays the Court to "provide restitution for denial/violation of civil rights."

The County Defendants filed their answer on September 22, 1999. On November 5, 1999, attorney Kenneth L. Lawson filed a Notice of Appearance and a Motion to Amend the Complaint. On December 22, 1999, Max Lachman's Motion to Amend the Complaint was granted, and on the same date, he filed his First Amended Complaint. (See Appendix). This pleading purported to name additional "John Doe" defendants of the Cincinnati Police Department and alleged a cause of action in intentional infliction of emotional distress on behalf of Max Lachman's father, Edward Lachman. Id.

The First Amended Complaint did not incorporate the allegations of Max Lachman's *pro se* Complaint and did not contain any allegations of further wrongful activity on the part of the County Defendants. The First Amended Complaint claims in pertinent part:

In addition, the complaint is amended to state: On or about November 14, 1999 [sic], Defendants John Doe 1 and John Doe 2, entered Plaintiff Edward Lachman's home without a warrant, exigent circumstances, or any other legitimate reason, in violation of the 4th Amendment to the United States Constitution.

Defendants John Doe 1 and John Doe 2, were acting under color of state law, and at the direction, acquiesces [sic], and with a custom and police [sic] of Defendant Cincinnati Police Department.

Defendants caused intentional infliction of emotional distress upon Plaintiff Edward Lachman, in defendant's actions of using excessive force and/or unreasonable seizure upon [sic] his son, Max Lachman, in his presence without just cause or a reasonable belief that excessive force and/or unreasonable seizure was necessary. (Emphasis added).

On January 25, 2001, the action of Petitioner Lachman and Max Lachman, as referenced above, was dismissed by District Court Judge Dlott, upon the Report and Recommendation of Magistrate Hogan, as being barred by the applicable statute of limitations. (See Appendix)

Despite the above referenced disposition of the case, which was not appealed, Petitioner Lachman filed yet another Complaint, this time in state court (Hamilton County Municipal Court) on November 21, 2001. Once again, he named Wietermarschen and Crowe as defendants. The allegations, operative set of facts, and claims for relief in that case mirrored those of Petitioner's previously litigated federal

case. Respondents Wietermarschen and Crowe, as the County Defendants in that action, filed a Motion for Summary Judgment in the Municipal Court action on December 18, 2001. Municipal Court Magistrate Wolf heard oral arguments on the County Defendants' Motion and subsequently summarily dismissed Petitioner Lachman's Municipal Court action as being barred by the doctrines of *res judicata* and collateral estoppel. On February 28, 2002, Municipal Court Judge Mattingly approved the decision of Magistrate Wolf ordering summary judgment for the County Defendants, the Respondents herein. (See Appendix)

Petitioner Lachman filed his Notice of Appeal to the Ohio First District Court of Appeals on February 28, 2002. That Court affirmed the decision of the trial court on December 6, 2002. Lachman filed his Notice of Appeal to the Ohio Supreme Court on January 21, 2003, and that Court declined to accept jurisdiction. Petitioner now seeks to have this Court entertain, for the fourth time, the very same claims.

ARGUMENT

I. Introduction.

Petitioner's claims against these Respondents, Wietermarschen and Crowe, were given a full and complete airing in the United States District Court, Southern District of Ohio, Western Division. District Court Judge Dlott ordered that summary judgment be granted to Respondents based on the applicable statute of limitations. No appeal was taken with respect to that decision. Petitioner Lachman's subsequent state claims added nothing new to a cause of action that was originally and properly disposed of in federal District Court. Thus, the current petition, like all of those

actions which preceded it in the Ohio state courts, must fail on based on *res judicata* and collateral estoppel.

II. Petitioner Lachman Is Barred from Attempting to Relitigate His Claims Against These Respondents.

In the case at bar, the doctrines of *res judicata* and/or collateral estoppel continually defeat Petitioner's repeated attempts to relitigate his claims beyond the original federal court action. The doctrine of *res judicata* consists of two related concepts -- claim preclusion and issue preclusion. *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 381, 653 N.E.2d 226 (1995). Claim preclusion provides that, "a valid final judgment, rendered upon the merits, bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject of the previous action." *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* , 81 Ohio St. 3d 392, 395, 692 N.E.2d 140 (1998). Under issue preclusion, "once a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause in the two actions be identical or different." *Id.* The doctrine of *res judicata* requires a party to raise every ground for relief in a first action or be forever barred from asserting it. *Rogers v. Whitehall*, 25 Ohio St. 3d 67, 69, 494 N.E.2d 1387, 1388 (1986); *Zolg v. Hargrave*, 1998 Ohio App. LEXIS 2873 (June 26, 1998), Hamilton App. No. C-970461, unreported (See Appendix). It is well established, then, that a claim litigated in federal district court cannot be relitigated in a state court when the state claim involves an identical cause of action previously litigated and involves the same parties or their privies.; *Rogers v. Whitehall, supra*; *Borowski v. State Chem*

Mfg. Co., 97 Ohio App. 3d 635, 640-641, 647 N.E.2d 230 (1994).

Petitioner Lachman's name appears as a named Plaintiff, in addition to that of Max Lachman, on the First and Second Amended Complaints filed in the United States District Court. (See Appendix) Petitioner Lachman's subsequent actions in state court again assert causes of action surrounding the morning of November 14, 1997. Indeed, even a cursory comparison of each of the federal and state complaints reveals alleged injuries sustained by both Edward and Max Lachman resulting from the events of Max Lachman's arrest on the morning of November 14, 1997. Petitioner Lachman was required to raise every ground for relief in the Complaint or be forever barred from asserting it, but he did not do so. *Rogers, supra.* His additional cause of action, that of common law trespass, pursued in state court, was properly dismissed. (See Appendix)

Summarily, Petitioner Lachman's claims against the County Defendants were given a full and complete airing in federal court, and as such, his present petition for a writ of certiorari should be denied on the basis of *res judicata* and collateral estoppel.

III. Petitioner's Claims Against These Respondents Are Barred by the Applicable Statute of Limitations.

Petitioner Lachman sought, in various courts, to recover for injuries to his person and property in the form of "extreme emotional distress" and as a result of an unlawful seizure of his person and deprivation of liberty through the arrest of his son, Max Lachman. These claims involved allegations of governmental behavior explicitly addressed by the Constitution of the United States, specifically the Fourth,

Eighth, and Fourteenth Amendments -- not under any corresponding theory of state tort law. As such, Lachman did not have a constitutional claim that was separate from his § 1983 claim. *See, Frantz v. Village of Bradford,* 245 F. 3d 869 (6th Cir. 2001). In any event, a claim which may have a longer period of limitation, cannot survive, standing alone, if the essential character of the claim provides a shorter period within which to bring the action. *See, Doe v. First United Methodist Church,* 68 Ohio St.3d 531, 629 N.E.2d 402 (1994); and *Manin v. Diloretti*, 94 Ohio App.3d 777, 641 N.E.2d 826 (1994).

The statute of limitations for 42 U.S.C. § 1983 and for claims of negligence are governed by O.R.C. § 2305.10 which requires that actions for bodily injury be filed within two years of their accrual. *Browning v. Pendleton,* 869 F.2d 989 (6th Cir.1989). Claims arising out of the Ohio Constitution are likewise subject to the two year limit of O.R.C. § 2305.10. *Kotyk v. Rebovich*, 87 Ohio App. 3d 116, 621 N.E.2d 897 (1993). Most importantly, claims against political subdivisions and their employees are governed by the two year statute of limitations found in O.R.C. § 2744.04. *Bojac v. Kutevac,* 64 Ohio App. 3d 368, 581 N.E.2d 625 (1990).

Petitioner Lachman's claims against these Respondents (the County Defendants) were actions against employees of Hamilton County, a political subdivision of the State of Ohio. Lachman sought damages for injuries allegedly caused by acts or omissions to act by employees of Hamilton County performing a governmental function as defined in R.C. § 2744.01. The definition of a "governmental function" under Ohio law is found in O.R.C. § 2744.01(C) which states in pertinent part:

(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

* * *

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.[1]

(2) A "governmental function" includes, but is not limited to, the following:

* * *

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions; . . .
(i) The enforcement or nonperformance of any law; . . .

Lachman did not allege any activity on the part of the County Defendants that did not meet one, or more, of the foregoing definitions. The statute of limitations for those seeking recovery against a political subdivision of the State of Ohio for the performance or nonperformance of a

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[1] None of the R.C. § 2744.01(G)(2) functions are applicable to County Defendants' conduct in this case.

governmental function is governed by Ohio Revised Code Section 2744.04[2], which provides in part:

> (A) An action against a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought *within two years after the cause of action arose*, or within any applicable shorter period of time for bringing the action provided by the Revised Code. This division applies to actions brought against political subdivisions by all persons, governmental entities, and the state. (Emphasis added).

This section also applies to actions against employees of governmental subdivisions. *Bojac, supra*. As stated therein:

> Appellants argue that appellee was sued individually because, although he was an employee of a political subdivision, he was acting outside the scope of his employment or with malicious purpose, bad faith, or in a wanton or reckless manner within the meaning of R.C. 2744.03(A)(6)(a) and (b). Therefore, appellants claim that, instead of the two-year statute of limitations set forth in R.C. 2744.04 (A) applying, the applicable statute of limitations is four years as set forth in R.C. 2305.09(D).

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[2] This is the pre HB 350 (Tort Reform Act) version.

> Appellants' argument is without merit. It is clear that the statute of limitations for suing a political subdivision is two years. R.C. 2744.04(A). Following appellants' line of reasoning, however, an employee could be sued for an additional two-year period and the employer would have to pay for the defense and reimburse the employee for the judgment if the employee was found to be acting within the scope of his or her duties. See R.C. 2744.01 *et seq.* The legislature could not have intended such a result.

Id. at 371.

Lachman's initial Section 1983 case was dismissed by the District Court because the claims he asserted against the Respondents were barred by the statute of limitations. Suits brought under § 1983, more than two years after the cause of action arose have been characterized as "frivolous." *Nash v. Cuyahoga Metropolitan Housing Authority*, 1999 U.S. App. LEXIS 32519 (6th Cir. 1999). (See Appendix) (Emphasis added). Petitioner Lachman's Amended Complaint in federal court, on its face, was thus barred by the aforementioned statutes of limitation and properly dismissed.

IV. Conclusion

Both federal and state courts have previously, and correctly, dismissed Petitioner Lachman's claims against these Respondents based upon the statutes of limitations and on the well established principles of *res judicata*/and collateral estoppel. In light of the factual and procedural history of Petitioner Lachman's claims relating to the incidents which occurred on November 14, 1997, the applicable legal authority set out herein, and the absence of any compelling reason for this Court to entertain jurisdiction of Petitioner's

claims, the Respondents respectfully request that this Court deny Edward Lachman's Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL K. ALLEN
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

David T. Stevenson
Counsel of Record
Susan Marie Gertz
Assistant Prosecuting Attorneys
230 E. Ninth Street
Suite 4000
Cincinnati, Ohio 45202
(513) 946-3040
FAX: (513) 946-3018

ATTORNEYS FOR
RESPONDENTS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-347
Dlott, J.
Hogan, M.J.

[Dated December, 1999]

Max Lachman,	)
Plaintiff,	)
	)
vs.	)
	)
Hamilton County Dept. of	)
Adult Probation, et al.	)
Defendants.	)
	)

PLAINTIFF'S FIRST AMENDED COMPLAINT

The complaint is amended to add Edward Lachman, 87 Juergens Ave, Cincinnati, Ohio 45220. The complaint is also amended to add Joe Doe 1 and Joe Doe 2 as defendants.

In addition, the complaint is amended to state: On or about November 14, 1999, Defendants John Doe 1 and John Doe 2, entered Plaintiff Edward Lachman's home without a warrant, extingent circumstances, or any other legitimate

reason, in violation of the 4th Amendment to the United States Constitution.

Defendants John Doe 1 and John Doe 2, were acting under color of state law, and at the direction, acquiesces, and with a custom and police of Defendant Cincinnati Police Department.

Defendants caused intentional infliction of emotional distress upon Plaintiff Edward Lachman, in defendants' actions of using excessive force and/or unreasonable seizure upon his son, Max Lachman, in his presence without just cause or a reasonable belief that excessive force and/or unreasonable seizure was necessary.

Respectfully submitted,

/s/ _____

Kenneth L. Lawson (0042468)
Kenneth L. Lawson & Associates
1014 Vine Street, Suite 1575
Cincinnati, Ohio 45202

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-347

District Judge Susan J. Dlott

MAX LACHMAN, et al.,
Plaintiff(s)

v.

HAMILTON COUNTY DEPARTMENT OF ADULT PROBATION, et al.,
Defendant(s)

ORDER

The Court has reviewed the Report and Recommendations of the United States Magistrate Judge (Doc. 20), to whom this case was referred pursuant to 28 U.S.C. §636(b), and noting that no objections have been filed thereto and that the time for filing such objections under Fed. R. Civ. P. 72(b) expired April 24, 2000, hereby ADOPTS said Report and Recommendations.

It is therefore ORDERED that:

1. Defendant City of Cincinnati Police Division's motion to dismiss (Doc. 4) is hereby DENIED AS MOOT;

2. Defendants Hamilton County Department of Adult Probation, Hamilton County Prosecutor's Office and Hamilton County Justice Center's motion for summary judgment (Doc. 12) is hereby DENIED AS MOOT;

3. The defendants Hamilton County Prosecutor's Office, the Hamilton County Justice Center, the Hamilton County Department of Adult Probation, and the City of Cincinnati Police Department are hereby DISMISSED as defendants in this matter;

4. The remaining defendants in this matter are C. Eric Crowe, Bill Weitmarschen, Deborah Lahm, and Unknown Hamilton County Deputy Sheriffs.

IT IS SO ORDERED.

/s/ _____
Susan J. Dlott
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-347

(Dlott, J.; Hogan, M.J.)

Max Lachman, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
Hamilton County	)
Department of Adult	)
Probation, et al.,	)
Defendants.	)
	)

NOTICE

Attached hereto is the Report and Recommended decision of the Honorable Timothy S. Hogan, United States Magistrate Judge, which was filed on 4/5/00. Any party may object to the Magistrate's findings, recommendations, and report within (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters,* 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all Parties, the Judge, and the Magistrate, a written Motion to Review which shall specifically identify

the portions of the proposed findings, recommendations, or report to which objection is made along with a memorandum of law setting forth the basis for such objection, (such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served a copy thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-99-347

[Filed April 5, 2000]

Max Lachman, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
Hamilton County	)
Department of Adult	)
Probation, et al.,	)
Defendants.	)
	)

REPORT AND RECOMMENDATION
(Dlott, J.; Hogan, M.J.)

This 42 U.S.C. § 1983 action was initially filed pro se by plaintiff Max Lachman. (Doc. 1). The original complaint named the Hamilton County, Ohio Prosecutor's Office, the Hamilton County Justice Center, the Hamilton County Department of Adult Probation, and the City of Cincinnati Police Department as defendants. (Doc. 1). On November 5, 1999, counsel entered an appearance on behalf of plaintiff Max Lachman. (Doc. 7). On December 22, 1999, an amended complaint was filed adding plaintiff Edward Lachman, the father of Max Lachman, and John Does 1 and 2 as defendants in this action. (Doc. 10). The undersigned issued a Report and Recommendation recommending that

defendant City of Cincinnati Police Division's[1] motion to dismiss be granted. (Doc. 11). Upon review, the Court declined to adopt the Report and Recommendation and ordered plaintiffs to amend their complaint and file their response to defendant City of Cincinnati Police Division's motion to dismiss no later than March 13, 2000. (Doc. 15).

This matter is before the Court on defendant City of Cincinnati Police Division's motion to dismiss (Doc. 4), the motion for summary judgment on behalf of defendants Hamilton County Department of Adult Probation, Hamilton County Prosecutor's Office, and the Hamilton County Justice Center (Doc. 12), plaintiffs' memorandum in opposition to the motions to dismiss and for summary judgment (Doc. 17), and the County defendants' reply memorandum. (Doc. 18).

Plaintiffs filed a second amended complaint in this matter on March 13, 2000. (Doc. 16). Plaintiffs' second amended complaint names as defendants Cincinnati Police Offfcers C, Eric Crowe and Bill Weitmarschen; Deborah Lahm, a probation officer with the Hamilton County Probation Department; and Unknown Hamilton County Deputy Sheriffs. Defendants Crowe, Weitmarschen, and Unknown Hamilton County Deputy Sheriffs are named in their individual capacities for money damages and their official capacities for injunctive and declaratory relief. Defendant Lahm is named in her individual capacity only.

The second amended complaint alleges that on or about November 14, 1997, defendant Lahm approved Max Lachman leaving the Crisis Center with Edward Lachman.

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[1] The City of Cincinnati Police Division is denominated as the City of Cincinnati Police Department in the complaint.

Plaintiffs allege that Lahrn's approval was either negligently communicated or Lahm negligently failed to obtain all relevant information from the Crisis Center that would assure Max Lachman's departure and stay with Edward Lachman would be peaceful and fruitful. (Doc. 16, ¶¶1-2).

The second amended complaint further alleges that on or about November 14, 1997, defendants Crowe and Weitmarschen entered Edward Lachman's home without a warrant, extenuating circumstances, or any other legitimate reason. Crowe and Weitmarschen arrested Max Laehman, using excessive force in the process. Plaintiffs claim that such force caused Max Laehrnan physical and emotional injury. Plaintiffs allege that the police officers entered Edward Lachman's home without a warrant and used excessive force at the direction, acquiescence, and with the custom and policy of the Cincinnati Police Division. (Doc. 16, ¶3-5). Plaintiffs further allege that defendants Crowe and Weitmarschen caused intentional infliction of emotional distress upon plaintiff Edward Lachman in their use of excessive force and/or unreasonable seizure of his son Max Lachman. (Doc. 16, ¶6).

The second amended complaint also alleges that plaintiff Max Lachnaan was thereafter transported to the Hamilton County Justice Center where unknown Hamilton County deputy sheriffs placed him in solitary confinement while he was handcuffed. Plaintiffs allege that the handcuffs caused lacerations and injury to Max Lachman and that the unknown deputies refused to remove the handcuffs from his wrists. Plaintiffs allege that upon belief and information, defendants have a custom and policy of keeping prisoners handcuffed while confined in solitary confinement. (Doc. 16, ¶7).

I. Defendant City of Cincinnati Police Division's Motion to Dismiss Should be Denied.

The motion to dismiss by City of Cincinnati Police Division seeks a dismissal based on the original complaint. Plaintiffs' second amended complaint does not name the City of Cincinnati Police Division as a defendant in this matter. Plaintiffs' second amended complaint supersedes the original and amended complaints which are treated as nonexistent. *See Klyce v. Ramirez,* 852 F.2d 568 (6th Cir. 1988)(unpublished), 1988 W.L. 74155, *3, citing *Bullen v. B. De Bretteville Treasure Co.,* 239 F.2d 824, 833 (9th Cir. 1956), *cert. denied,* 353 U.S. 947 (1957). *See also Clark v. Tarrant County,* 798 F.2d 736, 740-41 (5th Cir. 1986);*Fritz v. Standard Sec. Life Ins. Co.,* 676 F.2d 1356, 1358 (11th Cir. 1982); *Morrow v. South,* 540 F. Supp. 1104, 1113-14 (S.D. Ohio 1982)(Rice, J.); *Podlesnick v. Airborne Exp., Inc.,* 94 F.R.D. 288, 291 (S.D. Ohio 1982)(Rice, J.). Thus, defendant City of Cincinnati Police Division's motion to dismiss should be denied as moot.

II. The County Defendants' Motion for Summary Judgment Should be Denied.

The County defendants' motion for summary judgment was filed on February 18, 2000, prior to the filing of the second amended complaint in this case. (Doc. 12). Thus, the arguments and grounds for the motion are directed toward the original and first amended complaints. As explained above, the second amended complaint supersedes the original and first amended complaints. The original and first amended complaints serve no function in this case and any subsequent motion made by defendants should be directed at the second amended complaint. 6 C. Wright, A. Miller & M, Kane, Federal Practice and Procedure ¶ 1476 (2d ed.

1990)(foomotes omitted). However, defendants should not be required to file a new motion for summary judgment simply because a second amended complaint was introduced while their motion was pending. "If some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading." *Id.*

The contentions presented in the County defendants' motion for summary judgment are not germane to the second amended complaint. While the Hamilton County Justice Center, the Hamilton County Adult Probation Department, and the Hamilton County Prosecutor's Office are named as defendants in the original complaint, they are not named as defendants in the second amended complaint. (Doc. 12 at 8-9). Nor are the claims raised in the original pro se complaint the same as those raised in the second amended complaint. Unlike the original complaint, the second amended complaint does not allege a claim for "false arrest at the order of the Probation Department" or "malicious prosecution and abuse of process" on the part of the County Prosecutor's Office. (Doc. 1 at 5). Therefore, the immunity arguments advanced by defendants Hamilton County Adult Probation Department and Hamilton County Prosecutor's Office (Doc. 12 at 5-7, 8-9) are not applicable to the second amended complaint.

Likewise, the alleged deficiencies in the original complaint concerning the treatment plaintiff Max Lachman received while at the Hamilton County Justice Center (Doc. 12 at 7-9) were cured by the second amended complaint. The second amended complaint alleges facts which, if true, state a claim for a violation of plaintiff's Fourteenth Amendment rights against defendants unknown deputy sheriffs. *See Bell v. Wolfish,* 441 U.S. 520, 535 (1979).

For these reasons, the County defendants' motion for summary judgment should be denied as moot.

III. The Statute of Limitations Defense Raised in Defendants' Reply Brief Should be Raised by a Separate Motion Directed to the Second Amended Complaint.

In their reply brief, the County defendants argue that the "claims against the named and unidentified individual defendants asserted in plaintiffs' Second Amended Complaint are likely barred by the appropriate statute of limitations." (Doc. 18 at 4). Because the Hamilton County Justice Center, the Hamilton County Adult Probation Department, and the Hamilton County Prosecutor's Office are no longer defendants in this action, any potential defenses possessed by the individual defendants named in the second complaint should be raised by those defendants. Therefore, the Court declines to address the issue of the statute of limitations at this time.

IT IS THEREFORE RECOMMENDED THAT:

1. Defendant City of Cincinnati Police Division's motion to dismiss (Doc. 4) be **DENIED** as moot.

2. The motion for summary judgment on behalf of defendants Hamilton County Department of Adult Probation, Hamilton County Prosecutor's Office, and the Hamilton County Justice Center (Doc. 12) be **DENIED** as moot.

3. If these recommendations are adopted by the Court, the Court should issue an Order:

a. Dismissing the Hamilton County Prosecutor's Office,

the Hamilton County Justice Center, the Hamilton County Department of Adult Probation, and the City of Cincinnati Police Department as defendants in this matter; and

b. Clarifying that the remaining defendants in this matter are C. Eric Crowe, Bill Weitmarschen, Deborah Lahm, and Unknown Hamilton County Deputy Sheriffs.

Date: April 4, 2000 /s/ _____
Timothy S. Hogan
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-347

(Judge Dlott)
(Mag. Judge Hogan)

[Filed March 13, 2000]

Max Lachman	)
87 Guergens	)
Cincinnati, Ohio 45220	)
	)
and	)
	)
Edward Lachman	)
87 Guergens	)
Cincinnati, Ohio 45220	)
	)
Plaintiff,	)
	)
vs.	)
	)
C. Eric Crowe	)
Cincinnati Police Division	)
310 Ezzard Charles	)
Cincinnati, Ohio 45214	)

and)
)
Bill Weit Marschen)
Cincinnati Police Division)
310 Ezzard Charles)
Cincinnati, Ohio 45214)
)
and)
)
Deborah Lahm)
Adult Probation Department)
800 Broadway)
Cincinnati, Ohio 45202)
)
and)
)
Unknown Hamilton County)
Deputy Sheriffs)
Hamilton County Justice Center)
900 Sycamore Street)
Cincinnati, Ohio 45202)
)
Defendants.)
_____)

SECOND AMENDED C0MPLAINT
(Jury Demand Endorsed Hereon)

I. Complaint

1. On or about November 14, 1997, Defendant Lahm approved Plaintiff Max Lachman leaving the Crisis Center with Plaintiff Edward Lachman.

2. Defendant Lahm's approval was either negligently communicated or Defendant negligently failed to obtain all relevant information from the Crisis Center that would have assured that Plaintiff Max Lachman's departure and stay with Plaintiff Edward Lachman would have been a peaceful and fruitful stay.

3. On or about November 14, 1997, Defendants Crowe and Marschen entered Plaintiff Edward Lachman's home without a warrant, extenuating circumstances, or any other legitimate reason, in violation of the Fourth Amendment to the United States Constitution.

4. Defendants Crowe and Marschen arrested, apprehended, and used excessive force upon Plaintiff Max Lachman, causing him injury to body and mind.

5. Defendants Crowe and Marschen were acting under color of state law, and at the direction, acquiescence, and with the custom and policy of the Cincinnati Police Division in entering said home without a warrant and using excessive force upon a citizen.

6. Defendants Crowe and Marschen caused intentional infliction of emotional distress upon Plaintiff Edward Lachman, in Defendants' action of using excessive force and/or unreasonable seizure of his son, Plaintiff Max Lachman, in their presence without just cause or a reasonable belief that excessive force and/or unreasonable seizure was necessary.

7. Defendants Crowe and Marschen transported Plaintiff Max Lachman to the Hamilton County Justice Center on November 14, 1997. While at the Hamilton County Justice Center, unknown Hamilton County deputy sheriff defendants,

placed Plaintiff Max Lachman into the solitary confinement cell while handcuffed. Said handcuffs caused lacerations and injury to Plaintiff Lachman wrists, to the point of bleeding and said unknown deputies refused to remove said handcuffs. Upon belief and information, Defendants have a custom and policy of keeping prisoners handcuffed while confined in solitary confinement.

II. Jurisdictional Statement

8. This action is brought pursuant to 42 U.S.C. § 1983 and state law. The Court has jurisdiction pursuant to 18 U.S.C. §1331 and 28 U.S.C. §1367 for those claims brought under state law. Venue is pursuant to 28 U.S.C. § 1391.

III. Parties

9. Plaintiff Max Lachman is a citizen of the United States of American in Hamilton County, Ohio. The laws governing Hamilton County and the United States Constitution protect him. As a proximate cause and result of Defendants" actions, he received substantial injury and financial loss.

10. Plaintiff Edward Lachman is the father of Plaintiff Max Lachman. He is a citizen of Hamilton County, Ohio and the United States of America, and as such, he is entitled to the protection of the laws of Hamilton County, United States Constitution. As the proximate cause and result of Defendants' actions, he received substantial injury and financial loss.

11. Defendant C. Eric Crowe is a Cincinnati Police Officer sworn to uphold the law. He is being sued in his official and individual capacities.

12. Defendant Bill Welt Marschen is a Cincinnati Police Officer, and as such, he is responsible to uphold the laws of the State of Ohio and the United States. He is being sued in his official and individual capacities.

13. Defendant Deborah Lahm is a probation Officer with the Hamilton County Probation Department. As such, she is responsible for upholding the laws of the State of Ohio and the United States constitution. She is being sued in her individual capacity only.

14. Defendants Unknown Deputy Sheriffs are law enforcement officers who have a duty to uphold the laws of the State of Ohio and the United States Constitution. At all times relevant to this actions, Defendants were working in their capacities as correctional personnel in the Hamilton County Justice Center. Defendants are being sued in both their individual and official capacities.

FIRST CAUSE OF ACTION

15. Defendants Crowe's and Marschen's actions of entering Plaintiff Edward Lachman's home without a warrant, extenuating circumstances, or any other legitimate reason, violated both Plaintiffs' Fourth Amendment rights to the United States Constitution.

SECOND CAUSE OF ACTION

16. Defendants Crowe's and Merschen's arrest, apprehension, and use of excessive force upon Plaintiff Max Lachman was in violation of the Fourth Amendment to the United States Constitution.

THIRD CAUSE OF ACTION

17. Defendants Crowe's and Merschen's actions of using excessive force in causing an unreasonable seizure upon Plaintiff Max Lachman violated Plaintiff Edward Lachman's right to be free from intentional infliction of emotional distress.

FOURTH CAUSE OF ACTION

18. Defendant Unknown Deputy Sheriff's actions of placing Plaintiff Max Lachman into a solitary confinement cell with tightened handcuffs that cause injury to Plaintiff, violated Plaintiff's Fourteenth Amendment right to the United States Constitution.

FIFTH CAUSE OF ACTION

19. Defendant Deborah Lahm's action of negligently communicating or negligently failing to obtain relevant information from the Crisis Center, was the proximate cause of initial injury caused to both Plaintiffs and her actions constitutes negligence.

PRAYER OF RELIEF

Plaintiffs request this Court to;

(A) Declare Defendants' actions unconstitutional;

(B) Enjoin Defendants in their official capacity from placing handcuffs on arrestees or suspects that are too tight and from failing loosen said cuffs when they are found to be too tight;

(C) Award Plaintiffs compensatory damages in an amount to be determined at trial against each Defendant in their individual capacities;

(D) Award Plaintiffs attorney fees from each Defendant in their individual capacities;

(E) Any other relief that this Court deems fit.

Respectfully submitted,

/s/ _____

Kenneth L. Lawson (0042468)
Kenneth L. Lawson & Associates
1014 Vine Street, Suite 1575
Cincinnati, Ohio 45202
Telephone: (513) 345-5000
Telecopier: (513) 345-5005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon Michael J. Harmon, Assistant City Solicitor, City of Cincinnati, Room 214, City Hall, 801 Plum Street, Cincinnati, Ohio 45202 and David T. Stevenson and Monica M. Saba, Assistant Prosecuting Attorneys, Civil Division, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202 by regular U.S. Mail on this 13th day of March, 2000.

/s/ _____

Kenneth L. Lawson

APPENDIX E

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

CASE NUMBER: 01 CV 29469

[Dated February 5, 2002]

EDWARD LACHMAN	)
PLAINTIFF,	)
	)
vs.	)
	)
BILL WIETMARSCHEN	)
C. ERIC CROWE	)
DEFENDANT.	)
	)

MAGISTRATE'S DECISION

This cause came to be heard on the defendant's Motion for Summary Judgment on the 8th day of January, 2002, in the Civil Division of the Hamilton County Municipal Court. Both parties were present and presented arguments on the Motion.

The complaint in this action has already been litigated in the United States District Court. This is clearly set forth in the defendant's Motion for Summary Judgment and copies of the prior complaint and decision by Magistrate Hogan are attached. In this hearing the plaintiff argued that he was not

a party to the action in Federal Court, however, a copy of the prior complaint demonstrated that Edward Lachman was a party in the prior case. Therefore, Edward Lachman is barred from attempting to relitigate his claim in this Court.

I therefore recommend defendant's Motion for Summary Judgment is granted.

Copies of this decision have been mailed to the parties or their counsel. Unless written objections to this decision are filed and served within 14 days of the date of its filing, the decision may become the order of the Court.

/s/ _____

Ellen T. Wolf, Magistrate
Hamilton County Municipal Court
February 5, 2002

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

CASE NUMBER: 01 CV 29469

EDWARD LACHMAN	)
	)
vs.	)
	)
BILL WIETMARSCHEN	)
C. ERIC CROWE	)
	)

Upon consideration of the Motion, Memorandum in Opposition to the Arguments of the parties, the Court finds that Defendants' Motion for Summary Judgment is well taken. Case dismissed.

/s/ _____
Magistrate

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

CASE NUMBER: 01 CV 29469

[Dated February 27, 2002]

EDWARD LACHMAN	)
PLAINTIFF,	)
	)
vs.	)
	)
BILL WIETMARSCHEN	)
C. ERIC CROWE	)
DEFENDANT.	)
	)

ENTRY OVERRULING OBJECTIONS TO THE DECISION OF THE MAGISTRATE AND APPROVING THE DECISION OF THE MAGISTRATE

ORDERED that the Decision of the Magistrate be approved; that the findings of the fact set forth therein are adopted as the findings of fact of the Court; and that the recommendations contained therein are adopted as the order of the Court.

/s/ _____
JUDGE MUNICIPAL COURT

2-27-02
DATE

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

CASE NUMBER: 01 CV 29469

[Dated February 28, 2002]

EDWARD LACHMAN	)
Plaintiff(s),	)
	)
vs.	)
	)
BILL WIETMARSCHEN	)
C. ERIC CROWE	)
Defendant(s)	)
	)

JUDGMENT ENTRY

[X] The objections to the Magistrate's decision are overruled (*Check if applicable*)

[X] The decision of the Magistrate is adopted and judgment is hereby rendered as follows:
(*Restate the recommended judgment*)

Defendant's Motion for Summary Judgment is granted.

/s/ _____
Judge of the Hamilton County Municipal Court

2-28-02
DATE

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-3056

[Filed December 10, 1999]

TIMOTHY M. NASH,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CUYAHOGA METROPOLITAN	)
HOUSING AUTHORITY,	)
Defendant-Appellee.	)
	)

Northern District of Ohio
98-02145
Nugent
12-4-98

JUDGES: Before JONES, BATCHELDER, and MOORE, Circuit Judges.

ORDER

Timothy M. Nash, proceeding pro se and in forma pauperis, appeals a district court judgment that dismissed his suit as frivolous pursuant to 28 U.S.C. § 1915(e). The case

has been referred to this panel pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, we unanimously agree that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Seeking monetary relief only, Nash filed a 42 U.S.C. § 1983 suit against the "Cuyahoga Metropolitan Housing Authorities Carver Park Estates" on September 10, 1998. Nash proceeded in forma pauperis. Nash claimed that the defendant unlawfully evicted him after police officers searched his home based on false allegations of drug trafficking on June 23, 1994.

The district court dismissed the suit as frivolous, concluding that it was barred by Ohio's two-year statute of limitations applicable to § 1983 suits and that the suit was frivolous on the merits.

In his timely appeal, Nash reasserts the claims he made in his complaint and argues that a four-year statute of limitations should have been applied to his claims.

The district court properly dismissed Nash's suit as frivolous. We review de novo a dismissal of an in forma pauperis complaint as frivolous under § 1915(e)(2)(B). *See McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997); *cf. Benson v. O'Brian*, 179 F.3d 1014, 1017 (6th Cir. 1999) (§ 1915(e) may not be applied to a fee-paid suit). A district court properly dismisses a complaint as frivolous when the plaintiff fails to present any claim with an arguable or rational basis in law or fact. *See Neitzke v. Williams*, 490 U.S. 319, 325, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989).

Nash's suit was legally frivolous because it was barred by the applicable statute of limitations. Section 1983 civil rights

actions arising in Ohio must be filed within two years after their accrual. *See Thomas v. Shipka*, 872 F.2d 772, 772-73 (6th Cir. 1989); *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989) (en banc). Nash's claim that a four-year limitations period should have applied is meritless. *See Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 519 (6th Cir. 1997). Nash's cause of action accrued in 1994, when the defendant evicted him following the search of his home because of suspected drug activity. A cause of action accrues and begins to run when the plaintiff knows or has reason to know of the injury that is the basis of his action. *See Friedman v. Estate of Presser*, 929 F.2d 1151, 1159 (6th Cir. 1991). Because Nash did not file his suit within two years after the action accrued, his § 1983 suit was time-barred.

The district court did not err in dismissing Nash's suit as frivolous. Accordingly, we affirm the district court's judgment for the reasons set forth in the district court's opinion and order entered on November 5, 1998. *See* Rule 34(j)(2)(C). Rules of the Sixth Circuit.

APPENDIX G

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

APPEAL No. C-970461

[Filed June 26, 1998]

DANIEL ZOLG,
Plaintiff-Appellant,

v.

RICHARD HARGRAVE,
Defendant-Appellee.

1998 Ohio App. LEXIS 2873
TRIAL NO. A-9604110

MEMORANDUM DECISION AND JUDGMENT ENTRY

Per Curiam

The issue in this case is whether the Hamilton County Court of Common Pleas was correct when it granted summary judgment in favor of defendant-appellee, Richard Hargrave. The trial court applied the doctrines of collateral estoppel and

res judicata and thus determined that plaintiff-appellant, Daniel Zolg, was barred from bringing an action in which he asserted claims of negligence and breach of contract against Hargrave. We conclude that the trial court was correct in its ruling for the following reasons.

The facts of this case are not in dispute, as they were previously established during an interpleader action in the United States District Court for the Southern District of Ohio.[1] Zolg was the business partner of Richard Hertel. Blanche Hertel is Richard's mother. In 1985 and 1988, New England Mutual Life ("NEML") issued two life insurance policies on Richard's life. Hargrave was the insurance agent who sold Richard the policies. In 1993, when Richard learned that he was terminally ill with cancer, he contacted Hargrave in order to execute a new designation-of-beneficiary form.

Both Zolg and Hargrave maintained in the federal interpleader action that Richard's intent was to designate Zolg as the primary beneficiary of the NEML policies, and his parents, William and Blanche Hertel, together, as secondary beneficiaries.[2] The designation form did not contain separate spaces for primary and secondary beneficiaries. When Hargrave completed the forms, he placed a circled "1" by Zolg's name and a circled "2" by the Hertels' names. The form was signed and sent to NEML's home office. When the form was processed there, Zolg and the Hertels were listed as equal co-beneficiaries. NEML returned copies of the processed forms to Hargrave, but he failed to notice the equal

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[1] *New England Mutual Life Ins. Co. v. Zolg* (1996), S.D. Ohio No. C 01-94-059, unreported.

[2] William Hertel predeceased Richard.

beneficiary designation.

Richard died in September of 1993. Zolg made a claim for the proceeds of Richard's life insurance policies, and Blanche Hertel made a claim for one-half of those proceeds. Accordingly, NEML initiated the interpleader action, deposited the insurance proceeds with the district court, and requested that Zolg and Blanche Hertel litigate the matter as to who should prevail.

Zolg counterclaimed for reformation of the beneficiary form. Zolg reasoned that the court should reform Richard's beneficiary designation because NEML had been negligent in processing the form, and that its negligence served to compound Hargrave's error.[3] Zolg also sought $ 10,000 damages on his negligence claim.

Both Zolg and NEML moved for summary judgment. The district court dismissed NEML from the action and permanently enjoined Zolg and Blanche Hertel from instituting any action in regard to the proceeds of Richard's insurance policies. The court further ordered that resolution of Zolg's negligence counterclaim be stayed pending the resolution of Zolg's and Blanche Hertel's claims to the insurance proceeds themselves.

The parties consented to a bench trial of the interpleader action before a district court magistrate, and the case was tried on January 16, 1996. Following that trial, the court ruled that Zolg and Blanche Hertel were to share the

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[3] Zolg also alleged that Hargrave was NEML's agent within the pleadings filed in federal district court.

insurance proceeds equally. In arriving at this judgment, the magistrate specifically found the following:

> the beneficiary designation form was executed by [Richard] with the knowledge that both he and his father, William Hertel, were suffering from terminal illness. There is credible evidence upon which the Court concludes that [Richard's] intent was to ensure that both his parents and Daniel Zolg were "taken care of" in the event of his death. Notwithstanding such a conclusion, Zolg fails to present clear and convincing evidence that the [beneficiary designation] form, as written, constitutes a mutual or unilateral mistake and that [Richard's] intent was other than that expressed by the form. For the foregoing reasons, the Court declines to reform the beneficiary designations applicable to [Richard's] insurance policies as established by the April 1993 beneficiary designation form.

On July 23, 1996, Zolg initiated this action, sounding in tort and contract, against Hargrave. Zolg alleged that, because of Hargrave's negligence, he was denied the entire proceeds of Richard's insurance policies. Zolg amended his complaint to allege further that he was the third-party beneficiary of an oral contract between Richard and Hargrave. Thereafter, Zolg and Hargrave filed motions for summary judgment. The trial court granted Hargrave's motion while denying Zolg's motion.

From that judgment, Zolg brings this timely appeal in which he asserts three assignments of error. We turn first to Zolg's second assignment of error, in which he urges that the lower court erred when it granted Hargrave's motion for summary judgment on the basis of *res judicata*.

It has long been the law of Ohio that a final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.[4] Further, an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in the first lawsuit. The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or to be forever barred from asserting it.[5] This rule "encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes."[6]

More recently, the Supreme Court of Ohio held:

> [A] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. (Paragraph two of the syllabus of *Norwood v. McDonald* [1943], 142 Ohio St. 299, 27 Ohio Op. 240, 52 N.E.2d 67, overruled; paragraph two of the syllabus of *Whitehead v. Gen. Tel. Co.* [1969], 20 Ohio St. 2d 108, 49 Ohio

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[4] *Norwood v. McDonald* (1943), 142 Ohio St. 299, 52 N.E.2d 67, paragraph one of the syllabus.

[5] *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St. 3d 60, 62, 558 N.E.2d 1178, 1180.

[6] *Id.* at 62, 558 N.E.2d at 1180 (citing *Brown v. Felsen* [1979], 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767).

Op. 2d 435, 254 N.E.2d 10, overruled to the extent inconsistent herewith; paragraph one of the syllabus of *Norwood, supra,* and paragraph one of the syllabus of *Whitehead, supra,* modified; 1 Restatement of the Law 2d, Judgments [1982], Sections 24-25, approved and adopted.).[7]

We have set forth the procedural posture of the federal action, which included Zolg's negligence counterclaim against NEML. While Hargrave was not named as a party by any of the litigants, he was a witness in that action and was obviously subject to process. More importantly, Zolg's counterclaim was predicated upon his allegation that Hargrave, as the agent of NEML, erroneously prepared the beneficiary designation forms by naming Zolg and Blanche Hertel as co-beneficiaries.[8] Based upon the above authority, we hold that Zolg's current claims against Hargrave are barred by the doctrine of *res judicata* as they could have been litigated in the federal action.

Further, Zolg argues that there was no mutuality of parties in this action and in the action in federal court because Hargrave was not in privity with NEML in the federal action. He contends that this bars the application of the doctrine of *res judicata*. This argument lacks merit. Zolg's argument is completely contrary to his position in federal court and is, in effect, an alternate legal theory for relief. Accordingly, he is

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[7] *Grava v. Parkman Twp.* (1997), 73 Ohio St. 3d 379, 653 N.E.2d 226, syllabus.

[8] T.d. 10, tab 19, at 3-5.

now barred from asserting it.[9]

Zolg also contends that he was not required to join Hargrave in the federal action because Hargrave was a joint tortfeasor with NEML, and because joint tortfeasors may be sued in succession until a judgment is satisfied.[10] However, in the case at bar, no newfacts, additional injuries or independent acts of negligence were alleged. Based upon the action in federal district court, there were no ambivalent issues remaining. Additionally, this argument fails because NEML prevailed on Zolg's negligence claim and there is no judgment to be satisfied.

Accordingly, Zolg's second assignment of error is overruled.

In his first assignment of error, Zolg contends that the lower court erred by granting Hargrave's motion for summary judgment on the basis of the doctrine of collateral estoppel. Zolg's third and final assignment of error assails the trial court's denial of his own motion for summary judgment. We find these assignments to be subsumed in our disposition of the second assignment of error. They are, accordingly, overruled.

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[9] The Ohio Supreme Court explained in *Grava, supra*, at 382, 653 N.E.2d 226, 228-229, that the application of the doctrine of *res judicata* is not limited to "only those subsequent actions involving the same legal theory of recovery as a previous action."

[10] Zolg relies upon *McCrory v. Children's Hosp.* (1986), 28 Ohio App. 3d 49, 501 N.E.2d 1238, for the proposition that a joint tortfeasor can be held responsible for independent acts of negligence and additional injuries.

For the foregoing reasons, the judgment of the court of common pleas is affirmed. And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty. It is further Ordered that costs be taxed in compliance with App.R. 24, that a copy of this Memorandum Decision and Judgment Entry shall constitute the mandate, and that said mandate shall be sent to the trial court for execution pursuant to App.R. 27.

Judgment affirmed.

SUNDERMANN, P.J., DOAN and HILDEBRANDT, JJ.